United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig w/affidavit of mailing

76-1329

To be argued by
RICHARD W. BREWSTER

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1329

UNITED STATES OF AMERICA,

Appellee,

—*against*—

CALVIN McCRAY,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE APPELLEE

DAVID G. TRAGER,
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TABLE OF CASES

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UNITED STATES OF AMERICA,

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BRIEF FOR THE APPELLEE

Preliminary Statement

Calvin McCray appeals from a judgment of the United States District Court for the Eastern District of New York (Weinstein, *J.*) entered on June 18, 1976, convicting him, following a jury trial, of knowingly, wilfully and unlawfully transferring a firearm without complying with 26 U.S.C. § 5812, § 5861(e) and § 5871, as well as 18 U.S.C. § 2.

Specifically, appellant McCray appeals from a conviction under Count Two of a three count indictment under the *National Firearms Registration and Transfer Act.* The Count under which the defendant was convicted charged that he illegally transferred a shotgun having a barrel length of less than eighteen inches, without complying with the provisions of Title 26 U.S.C., Section

5861(e). Count One charged him with unlawful possession of, and Count Three charged him with conspiracy with one Albert Bouknight [1] to transfer, the same weapon. Appellant was acquitted on the first and third counts.

On June 18, 1976, Calvin McCray was sentenced upon his conviction under Count Two of the indictment to five years imprisonment. Execution of the sentence was suspended and appellant was placed on probation for a period of five years and fined $1,500.00, payable, as the probation department directs, over the period of probation.

Statement of the Case [2]

The Government's first witness was Albert Bouknight, who testified that, in April of 1975, McCray showed him his gun collection consisting of some hand guns, a sawed-off shotgun and a "long gun" (T. 26). Bouknight stated that he acted as a middleman in the sale by McCray, on May 15, 1975, of two of these weapons, a .32 caliber pistol and the sawed-off shotgun, to Michael Galgano (T. 27-33). Specifically, Bouknight drove McCray, with a bag containing three guns, to a street corner in Hempstead

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[1] Albert Bouknight pleaded guilty to the conspiracy charge in advance of trial.

[2] On this appeal appellant did not furnish the Court of Appeals with a transcript of the trial testimony, contrary to the first paragraph of Court's order dated August 4, 1976. The Government has ordered the transcript and requested its filing. In addition, appellant's appendix curiously omits the decision by the Court below denying appellant's motion to set aside the guilty verdict on the basis of inconsistency (the very issue on appeal) and stating its reasons for the denial. See Government Appendix, at page 6a. In this brief, references to the trial transcript are preceded by the letter "T"; references to the Government's appendix are preceded by the letters "GA" and references to the appellant's appendix are preceded by the letters "AA".

where the appellant removed the pistol and sawed-off shotgun from the bag and sold them to Galgano (T. 32-33). Bouknight's share in the proceeds of sale was $40 (T. 89). Bouknight was arrested in mid-June after picking up a third weapon from appellant and delivering it to Michael Galgano (T. 33-37). At the time of his arrest, Bouknight learned that Galgano was a federal agent (T. 37).

Following Bouknight, the court permitted a brief interruption of the Government's direct case to allow appellant to call a defense witness, William Lewis, out of turn in order to minimize Lewis' absence from work (T. 120). The Government had previously made Lewis' identity known to the defense (T. 14) and disclosed that Lewis had contradicted a part of Bouknight's testimony (T. 15). As anticipated, Lewis denied Bouknight's statement that appellant had displayed a gun collection to them after they helped appellant bring a hot water heater into appellant's house (T. 123). On cross-examination, Lewis admitted telling agent Galgano that he "didn't want to get involved" in the McCray case (T. 124). The Court refused, because of the age of the conviction, to permit cross-examination of Lewis concerning a previous burglary conviction (T. 120-121).

Michael Galgano, a Special Agent of the Bureau of Alcohol, Tobacco and Firearms, was the Government's next witness. Agent Galgano testified as to his firearms transaction with Bouknight and appellant while acting in an undercover capacity on May 15, 1975 (T. 126-143). Galgano stated that appellant had removed the sawed-off shotgun and a revolver from a bag between his legs on the passenger side of Bouknight's car (T. 134). Appellant then wrapped these guns in a cloth, placed them in a paper bag and handed the bag to Bouknight, who in turn handed the bag to Agent Galgano (*Ibid*). Agent Galgano recalled handing $185 to Bouknight in payment for the guns and

then observed Bouknight immediately turn this sum over to appellant (T. 135). Agent Galgano also stated that appellant had displayed and offered to sell him a third weapon, a long-barrelled shotgun, which Galgano declined to purchase (T. 136).

After corroborative surveillance testimony by Special Agent Walter Bleyman, the Government called Alzo Paterson who described his friendship of many years with appellant (T. 196-220). Paterson stated that, some time after appellant's arrest, appellant had asked him to falsely tell appellant's attorney that he had seen Bouknight leave a package at appellant's fish store (T. 200). Paterson stated that, at the attorney's office, he also signed an affidavit to this effect, but that the exculpatory statements in the affidavit were also false (T. 201, 204). On cross-examination, appellant's attorney brought out Paterson's recent treatment for alcoholism and sought to establish that the witness' recantation of his affidavit was the result of threats of prosecution (T. 217-219).

Appellant, who testified in his own behalf, denied ever owning or possessing a sawed-off shotgun (T. 244). Appellant testified that just before May 15, 1975, Bouknight had left a package at his (appellant's) fish store (T. 247). Appellant stated that on May 15, Bouknight came to the store, picked up the unidentified package and persuaded appellant to take a ride with him to purchase a bottle of liquor (T. 251-252). On the way to the liquor store Bouknight stopped to make "a little deal" and asked appellant to "go along with the program" (T. 255). According to appellant, shortly before this stop, Bouknight told appellant to open the package and for the first time appellant realized that the package contained guns (T. 255). Appellant described the firearms transaction that ensued, but did not mention his having any role in displaying the guns to the buyers or physically receiving any

of the proceeds of sale (other than one $20 bill to purchase a bottle of liquor) (T. 256-257).

After cross-examination of appellant concerning the financial difficulties of his fish store (T. 264-273), appellant was questioned extensively about his previous testimony to a federal grand jury in the Eastern District, concerning the May 15 transaction and his post-arrest interviews by federal agents (T. 273-300). During cross-examination, appellant admitted that at the time of the sale, at Bouknight's request, he had informed the purchasers "that the guns were good and that [appellant] could get more" (T. 285; GA 4a).

The defense rested after calling a number of character witnesses (T. 307-320). Additionally, one defense witness testified that Bouknight occasionally left packages at appellant's fish store and on one occasion had offered to sell her a mace-like chemical (T. 321-322).

At the close of the evidence, the Court and counsel reviewed Judge Weinstein's proposed charge and at the request of appellant's counsel, the Court modified its proposed charges on possession (T. 327) and aiding and abetting (T. 328-331).

During summation the Government argued that the testimony of Bouknight, as corroborated by Agent Galgano and other Government witnesses, was ample to support a conviction of appellant for possession (Count One), transfer of a sawed-off shotgun (Count Two), and for conspiracy to transfer the shotgun (Count Three) (T. 332-355). However, at the end of its argument, the Government asked the jury, hypothetically, to analyze the defendant's testimony taken at face value (T. 353; GA 5a). The Government pointed to the appellant's admissions that he had gone "along with the program,"

that he had been present when the sale was completed, that he had touted the quality of the guns, and that he had told the purchasers that he could get more weapons (*Ibid.*). The prosecutor then asked the jury, "Is [the appellant] not by his own testimony guilty as a matter of law as an aider and abettor?"

During its deliberations, the jury sent a note requesting further instructions on Counts 2 and 3, the transfer count and the conspiracy count. In response to this note, the trial court reviewed the elements of these counts (T. 425-426; AA 31-32). The court again instructed the jury that each count had to be judged independently. At this time, one juror asked a question and the following colloquy occurred:

> "JUROR NO. 8: Count 2, the initial part of the transfer relates to possession, would you clarify that little bit?
>
> THE COURT: There has to be a transfer of possession from one person to another.
>
> JUROR NO. 8: It doesn't relate to the possession charged in the first count?
>
> THE COURT: Somebody has to have possession. Either Bouknight or this defendant and there has to be a transfer from one or both of them to the agent." *Ibid.*

After a brief sidebar,[3] the trial judge gave the following additional instruction:

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[3] "Mr. Nager : I have a request with respect to possession. There cannot be a transfer unless somebody has possession—

The Court: Do you want me to tell them that? I just did.

Mr. Nager: Pardon me. There was also something, if it was sealed in a box, he never came into possession?"

> THE COURT: Ladies and gentlemen, he would have to know, for this defendant to have participated in the transfer, he would have to know what was being transferred.
>
> Let's assume there was a sealed case and I ask you, would you turn that over to somebody and he turns it over and I didn't know what was in it. He couldn't be guilty of transferring a gun if there was a gun in it. He would have to know what was being transferred at the time of transfer." (AA 33).

The testimony of defense witness, William Lewis, was also requested and read to the jury. After the jury again retired, the Court remarked that the jury appeared remarkably able, commented on their extreme alertness during the trial and pointed out that one juror was a law student (T. 430; AA 37).

Following the verdict, appellant moved to set it aside as being inconsistent with the not guilty verdicts on the possession and conspiracy counts (T. 436; GA 6a). The district court denied the motion, stating:

> "These verdicts were not inconsistent. It is clear what the jury did. They gave every benefit of the doubt to this defendant and believed him as far as it was humanly possible to believe him." (T. 437; GA 6a).

After further stating that the jury would have been clearly justified in finding him guilty on all three counts, the court noted, "he was at least an aider and abettor by his own testimony." (GA 7a).

ARGUMENT

POINT I

INCONSISTENCY OF VERDICTS IS NOT A BASIS FOR REVERSAL.

Courts have long refused to upset jury verdicts on the basis of inconsistency. In *Hamling* v. *United States*, 418 U.S. 87, 101 (1974), the Supreme Court stated, "it has of course long been the rule that consistency in verdicts or judgments of convictions is not required."[4]

The Second Circuit has, of course, followed this rule and has upheld jury verdicts, though they may be inconsistent. For example, in *United States* v. *Costello*, 221 F.2d 668, 676 (2d Cir. 1955), *aff'd*, 350 U.S. 359, *rehearing denied*, 351 U.S. 904, this Court stated that, "rarely is consistency between the verdicts of a jury is never necessary." So too, by way of further example, this Court in *United States* v. *Fiorella*, 468 F.2d 688, 690 (2d Cir.), *cert. denied*, 417 U.S. 917 (1972) stated that "inconsistency has long been held to be one of the jury's prerogatives." See also, *Zane* v. *United States*, 495 F.2d 683 (2d Cir.), *cert. denied*, 417 U.S. 895 (1975). See also, *United States* v. *Carbone*, 378 F.2d 420 (2d Cir. 1967). Other circuits have followed the same rule. See, e.g., *United States* v. *Smith*, 523 F.2d 771 (5th Cir. 1975); *United States* v. *Papia*, 409 F. Supp. 1307 (D.C. Wis. 1976).

Accordingly, it is submitted that this argument is meritless and that further discussion is unnecessary.

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[4] Moreover, in the case at bar, Judge Weinstein found that the jury's verdicts were not inconsistent [GA 6a]. Curiously, this portion of the transcript was omitted from appellant's appendix. See footnote 2 above at page 2.

POINT II

JUDGE WEINSTEIN'S SUPPLEMENTAL INSTRUCTIONS TO THE JURY CONCERNING POSSESSION WERE NOT ERROR.

Appellant's claim that the supplemental charge concerning possession was error borders on the frivolous. In response to a jury note, Judge Weinstein, without objection by appellant, repeated his instruction to the jury that each court must be judged independently. Juror number 8 then raised the following question:

> "JUROR NO. 8: Count 2, the initial part of the transfer relates to possession, would you clarify that little bit?
>
> THE COURT: There has to be a transfer of possession from one person to another.
>
> JUROR NO. 8: It doesn't relate to the possession charged in the first count?
>
> THE COURT: Somebody has to have possession. Either Bouknight or this defendant and there has to be a transfer from one or both of them to the agent." (T. 425-426; AA 31-32).

Clearly this charge was correct. All the jury needed to find, as Judge Weinstein stated, was that somebody had to have possession of the shotgun prior to transfer. A finding by the jury that appellant did not possess or aid and abet the possession of the shotgun did not preclude the jury from finding that appellant aided and abetted the transfer, so long as *either* Bouknight or appellant possessed it. Indeed, the evidence was susceptible of no possible interpretation except that one of these two possessed the shotgun prior to its transfer. Moreover, at appellant's request,[5] the trial judge gave an additional

[5] See Statement of the Case, at p. 6.

clarifying instruction on Count Two in further response to juror No. 8's question:

> "THE COURT: Ladies and gentlemen, he would have to know, for this defendant to have participated in the transfer, he would have to know what was being transferred.
>
> Let's assume there was a sealed case and I ask you, would you turn that over to somebody and he turns it over and I didn't know what was in it. He couldn't be guilty of transferring a gun if there was a gun in it. He would have to know what was being transferred at the time of transfer." (T. 425-426; AA 33).

In sum, it is our contention that the additional instructions of Judge Weinstein were clearly correct. To argue otherwise is, it is respectfully submitted, without merit.

CONCLUSION

The judgment of conviction against appellant McCray should be affirmed in all respects.

Respectfully submitted,

Dated: October 22, 1976

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

BERNARD J. FRIED,
RICHARD W. BREWSTER,
Assistant United States Attorneys,
(Of Counsel).

GOVERNMENT APPENDIX

INDEX TO APPELLEE'S APPENDIX

Superseding Indictment

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

76 Cr. 110

(T. 26, U.S.C. § 5861(d), § 5861(e), § 5871, § 5841 and § 5812; T. 18, U.S.C. § 2 and § 371)

UNITED STATES OF AMERICA,

—against—

CALVIN MCCRAY and ALBERT BOUKNIGHT,

Defendants.

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 15th day of May 1975, within the Eastern District of New York, the defendant Calvin McGray did knowingly, wilfully, and unlawfully possess a firearm, as that term is defined in Title II of the Gun Control Act of 1968, to wit, a shotgun having a barrel length of less than 18 inches, which firearm was not registered to the defendant CALVIN McCRAY in the National Firearms Registration and Transfer Record, as required by Title 26, United States Code, Section 5841. (Title 26, United States Code, Sections 5841, 5861(d) and 5871 and Title 18, United States Code, Section 2).

COUNT TWO

On or about the 15th day of May 1975, within the Eastern District of New York, the defendant CALVIN McCRAY did knowingly, wilfully and unlawfully transfer a firearm, as that term is defined in Title II of the Gun Control Act of 1968, to wit a shotgun having a barrel length of less than 18 inches, without complying with the provisions of Title 26, United States Code, Section 5812. (Title 26, United States Code, Sections 5812, 5861(e) and 5871 and Title 18, United States Code, Section 2).

COUNT THREE

On or about the 15th day of May 1975, within the Eastern District of New York, the defendant CALVIN McCRAY and the defendant ALBERT BOUKNIGHT did knowingly and unlawfully combine, conspire and agree to commit an offense against the United States, to wit: to violate Title 26, United States Code, Section 5861(e) by conspiring to wilfully and knowingly transfer a firearm, as that term is defined in Title II of the Gun Control Act of 1968, namely a shotgun having a barrel length of less than 18 inches, without complying with the provisions of Title 26, United States Code, Section 5812; and in furtherance of the objects of said conspiracy, the defendants CALVIN McCRAY and ALBERT BOUKNIGHT committed the following overt acts:

OVERT ACTS

(1) On or about May 15, 1975, the defendants CALVIN McCRAY and ALBERT BOUKNIGHT went to the corner of Hastings Place and South Franklin Street, Hempstead, New York; and

(2) On or about May 15, 1975, the defendants CALVIN McCRAY and ALBERT BOUKNIGHT, at the aforesaid location, did deliver the aforesaid shotgun to an agent of the Bureau of Alcohol, Tobacco and Firearms of the United States States Treasury Department. (Title 18, United States Code, Section 371).

A TRUE BILL.

Foreman.

.....

.....

United States Attorney

Admissions by appellant on cross-examination concerning his role in firearms transaction

Q. But of course you remember telling Agent Bleyman and Agent Galgano that you told Tiny that the guns were good and that you could get some more——

Mr. Nager: I object to the form of the question.

The Court: Overruled.

The Witness: Please repeat that, please?

Q. Isn't it a fact, sir, that you told Agent Bleyman and Agent Galgano that you told Tiny at the time of the transaction that the guns were good and that you could get some more? A. Yes, sir, I said that.

Q. You said that? A. Yes, sir.

Q. You said that to Agent Galgano and Agent Bleyman? A. Yes, sir.

Q. You said that to Tiny at the time of the transaction? A. I was advised by Albert Bouknight to say this. He asked me to go along with it because I was trying to get more money out of Mr. Galgano or whoever he is.

Portion of Government's summation discussing the necessity of aiding and abetting conviction based upon appellant's own testimony

Mr. Brewster: Now, for a moment I would like you to analyze with me where we stand if we accept the defendant's testimony at face value. Remember he said he went along with the program in substance. He was there and there came a time when the gun sale actually took place. He said to Tiny, in substance, the guns are good and I can get more.

Ask yourselves if you just accept that as the whole truth, what are we dealing with and as a matter of law mere presence of course is not enough to convict. That is, mere presence at the scene of a crime. By those actions did not the defendant Calvin McCray associate himself with the venture and second, by his actions, to make it succeed? Is he not by his own testimony guilty as a matter of law as an aider and abettor?

Colloquy concerning motion to set aside guilty verdict on the basis of inconsistency and Judge Weinstein's ruling and findings on the motion

Mr. Nager: Your Honor, at this time, I move—I respectfully make a motion to set aside the verdict with respect to count two. It is unsupported either by law or in fact.

With respect to count one, where the defendant was found not guilty, presumably therefore they found that he was not in possession—when they found him not guilty of possession he clearly cannot transfer anything that he never possessed. The only thing is he was present at the time the transfer took place.

I submit that the verdict, since he was not guilty on one and not guilty on three, could not be guilty with respect to the transfer. I would move to set aside the verdict with respect to count two.

The Court: Motion denied. Even if the verdict on the three counts were inconsistent, I would deny the motion because of the jury's mercy dispensing powers. These verdicts were not inconsistent. It is clear what the jury did. They gave every benefit of the doubt to this defendant and believed him as far as it was humanly possible to believe him. Based upon the uncontroverted statements of the agents, it is clear that this defendant assisted at the time of the transfer and that he knowingly assisted because these guns were clearly visible. And that he shared in the proceeds and he took some of the proceeds almost directly and admitted that he got, according to the agent, almost all of the money, the jury can clearly have found him guilty of conspiracy but they gave him more than a reasonable doubt.

The jury could clearly have found him guilty of possession. In any event, he was at least an aider and abetter by his own testimony. The demeanor of the witness was not favorable. And the jury I think gave him more than his due in finding him not guilty on the first and third counts. He was clearly lying on the witness stand, at least in the Court's judgment.

Now, what is the bail situation?

Mr. Nager: He is on his own recognizance.

The Court: Any objection to continuing?

Mr. Brewster: None, Your Honor.

Mr. Nager: May I respectfully say I differ with the Court in connection with the question of lying since I have lived with Mr. McCray a long period of time and I have more than intimate knowledge, and I have found to me the man did not lie. I do consider the fact the jury did give him every benefit. I believe it was implicit in the testimony with respect to Bouknight who was the only witness against him and obviously they could not convict him on that.

The Court: They gave him every possible break. The physical facts were complete against him. His own admission he was clearly guilty of transfer. My impression of him is different than yours, I thought he lied throughout. The credibility was very poor, I thought.

Mr. Nager: Most respectfully excepted.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 26th day of October, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

George Nager, Esq.
1565 Franklin Ave.
Mineola, N.Y. 11501

Evelyn Cohen

Sworn to before me this
26th day of Oct. 1976

Olga P. Morgan

OLGA P. MORGAN
Notary Public, State of New York
No. 24-5019
Qualified in Kings County
Commission Expires March 30, 1977